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October 3, 2007

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: December 13, 2006

Case Number: TSO-0456

This Decision concerns the eligibility of xxxxxxxxxxxxxx (hereinafter referred to as "the individual") to hold an access authorization 1/ under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As set forth below, it is my decision, based on the evidence and testimony presented in this proceeding, that the individual's access authorization should not be restored.

I. Background

The individual is employed at a Department of Energy (DOE) facility where his work requires him to have an access authorization. In August 2006, DOE suspended the individual's access authorization. During a background investigation, the local DOE security office discovered some derogatory information that created a security concern. DOE asked the individual to participate in a Personnel Security Interview (PSI) in order to resolve the information. The PSI resolved some of the information, but other security concerns remained.

The local DOE security office issued a Notification Letter to the individual on November 1, 2006. The Notification Letter alleges under 10 C.F.R. § 710.8(f) that the individual has "deliberately misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire or Questionnaire for Sensitive National Security Positions." It also alleges that the individual "has engaged in unusual conduct or is subject to circumstances which tend to show that he is not honest, reliable, or trustworthy, or which furnishes reason to believe that he may be subject to pressure, coercion, exploitation, or duress which may cause him to act contrary to the best interest of the national security." 10 C.F.R. § 710.8(l).

1/ Access authorization is defined as an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material. 10 C.F.R. § 710.5(a).

In a letter to the local DOE security office, the individual exercised his right under Part 710 to request a hearing in this matter. 10 C.F.R. § 710.21(b). The Director of OHA appointed me as the Hearing Officer in this case. After conferring with the individual and the appointed DOE counsel, 10 C.F.R. § 710.24, I set a hearing date. At the hearing, the individual testified on his own behalf and elected to call three witnesses, including a police officer, a supervisor and a mentor. The agency called a DOE Personnel Security Specialist as its witness. The transcript taken at the hearing shall be hereinafter cited as “Tr.” Documents that were submitted by the DOE counsel and the individual during this proceeding constitute exhibits to the hearing transcript and shall be cited as “Ex.”

II. Regulatory Standard

A. Individual’s Burden

A DOE administrative review proceeding under Part 710 is not a criminal matter, where the government has the burden of proving the defendant guilty beyond a reasonable doubt. Rather, the standard in this proceeding places the burden on the individual because it is designed to protect national security interests. This is not an easy burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring a security clearance. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) (“clearly consistent with the national interest” standard for granting security clearances indicates “that security determinations should err, if they must, on the side of denials”); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

The individual must come forward at the hearing with evidence to convince the DOE that restoring his access authorization “will not endanger the common defense and security and will be clearly consistent with the national interest.” 10 C.F.R. § 710.27(d). The individual is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The Part 710 regulations are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

B. Basis for the Hearing Officer’s Decision

In access authorization cases arising under Part 710, it is my role as the Hearing Officer to issue a decision that reflects my comprehensive, common-sense judgment, made after consideration of all the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person’s access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). I am instructed by the regulations to resolve any doubt as to an individual’s access authorization eligibility in favor of the national security. *Id.*

III. Findings of Fact

The relevant facts in this case are uncontested. The individual was arrested as a juvenile for driving under the influence (DUI) in October 1999. He applied for employment with DOE in September 2004. While completing a Questionnaire for National Security Positions (QNSP), the individual was asked whether or not he has ever been charged with or convicted of any offense related to alcohol or drugs. The individual answered “no” to this question although he had been charged with a DUI as a juvenile in October 1999. On November 18, 2004, when his request for a security clearance was still pending, the individual was arrested for his second DUI. The individual did not inform DOE security of this arrest. As a result of this second DUI arrest, the individual’s license was suspended for 90 days. However, the individual continued to operate his vehicle. On November 24, 2004, the DOE granted the individual’s security clearance. On January 18, 2005, the individual began his employment with DOE. At this time, he attended a security briefing which reviewed DOE’s security rules and regulations. On November 20, 2005, the individual was arrested for his third DUI. While being transported to the police station, the individual offered the arresting police officer a \$1000 bribe to let him go.

Following his third DUI, the individual was required to submit to a Personnel Security Interview (PSI). During the PSI, conducted on February 1, 2006, the individual was asked questions about his multiple alcohol-related incidents. The individual was specifically asked whether he made a conscious decision not to list his 1999 arrest because of his concern that he would not get a security clearance. The individual responded affirmatively and stated that he “made a mistake.” *See* Notification Letter at 2. With respect to his November 2004 DUI, the individual admitted that he failed to report the arrest during the security briefing that took place in January 2005 because he did not believe reporting it would have an effect on his security clearance at that time. The individual also admitted that his driver’s license was suspended in November 2004, but that he continued to operate his vehicle until May 26, 2005. In addition, the individual admitted that he operated his vehicle twice in 2005 while under the influence of alcohol (in the second instance, the individual was arrested for DUI). Finally, the individual admitted that during his 2005 DUI arrest, he offered the arresting police officer a \$1000 bribe to release him. He explained that “all I could think about at the time was that I had put into jeopardy my job and my security clearance.” *Id.* at 3.

IV. Analysis

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. In resolving the question of the individual’s eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c). ^{2/} After due deliberation, I have determined that the individual’s

^{2/} Those factors include the following: the nature, extent, and seriousness of the conduct, the circumstances surrounding his conduct, to include knowledgeable participation, the frequency and recency of his conduct, the age and maturity at the time of the conduct, the voluntariness of his participation, the absence or presence of rehabilitation or reformation and other pertinent behavioral changes, the motivation for his conduct, the potential for pressure, coercion, (continued...)

access authorization should not be restored. I cannot find that such restoration would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this decision are discussed below.

A. Criterion F

The individual's failure to respond honestly in his QNSP about his October 1999 alcohol offense raises a valid and significant concern under Criterion F. False statements or misrepresentations by an individual in the course of an official inquiry regarding a determination of eligibility for DOE access authorization raise serious issues of honesty, reliability, and trustworthiness. The DOE security program is based on trust, and when an access authorization holder breaches that trust, it is difficult to determine to what extent the individual can be trusted again in the future. *See, e.g., Personnel Security Hearing* (Case No. VSO-0013), 25 DOE ¶ 82,752 at 85,515 (1995) (affirmed by OSA, 1995); *Personnel Security Hearing* (Case No. VSO-0281), 27 DOE ¶ 82,821 at 85,915 (1999), *aff'd*, *Personnel Security Review* (Case No. VSA-0281), 27 DOE ¶ 83,030 (2000) (terminated by OSA, 2000).

A finding of derogatory information does not, however, end the evaluation of evidence concerning the individual's eligibility for access authorization. *See Personnel Security Hearing* (Case No. VSO-0244), 27 DOE ¶ 82,797 (1999) (affirmed by OSA, 1999); *Personnel Security Hearing* (Case No. VSO-0154), 26 DOE ¶ 82,794 (1997), *aff'd*, *Personnel Security Review* (Case No. VSA-0154), 27 DOE ¶ 83,008 (1998) (affirmed by OSA, 1998). Cases involving verified falsifications or misrepresentations are nonetheless difficult to resolve because there are neither experts to opine about what constitutes rehabilitation from a pattern of lying nor self-help or self-awareness programs to achieve rehabilitation. Therefore, Hearing Officers must look at the statements of an individual, the facts surrounding the misrepresentation or false statement and the individual's subsequent history in order to assess whether the individual has rehabilitated himself from the falsehood and whether restoring the security clearance would pose a threat to national security. *See Personnel Security Hearing* (Case No. VSO-0327), 27 DOE ¶ 82,844 (2000), *aff'd*, *Personnel Security Review* (Case No. VSA-0327), 28 DOE ¶ 83,005 (2000) (affirmed by OSA, 2000); *Personnel Security Hearing* (Case No. VSO-0418), 28 DOE ¶ 82,795 (2001). In the end, as a Hearing Officer, I must exercise my common sense judgment whether the individual's access authorization should be restored after considering the applicable factors prescribed in 10 C.F.R. § 710.7(c).

B. Mitigation of Criterion F Concerns

The key issue in this case is whether the individual has brought forward sufficient evidence to demonstrate that he can now be trusted to be consistently honest and truthful with the DOE. In considering this question, I found that the nature of the individual's misrepresentation was serious. The individual's lack of candor concerning an area of his life that could increase his vulnerability to

2/(...continued)

exploitation, or duress, the likelihood of continuation or recurrence, and other relevant and material factors.

coercion or blackmail raises important security concerns. The DOE must rely on individuals who are granted access authorization to be honest and truthful; this important principle underlies the criterion set forth in 10 C.F.R. § 710.8(f). This principle has been consistently recognized by DOE Hearing Officers. *See, e.g., Personnel Security Hearing* (Case No. VSO-0281), 27 DOE ¶ 82,821 at 85,915 (1999).

The only falsification issue in this case is the individual's omission of his October 1999 DUI on his September 14, 2004 QNSP. *See* Notification Letter at 2. During the hearing, the individual explained that he was a juvenile when this arrest occurred. He testified to the following:

It was a juvenile adjudication that had been, as they told me, expunged from my record when I was 18 years old. Looking at the forms, themselves, they say you don't have to report any information that was expunged, due to certain criteria. I didn't look at the criteria, but, to me, and this is from after the occasion, speaking with my lawyer, also, I don't feel that it was information that I had to disclose at the time. . . .because it was juvenile, expunged from my record.

Transcript (Tr.) of Personnel Security Hearing at 123.

The individual submitted a portion of the pertinent state law where the arrest occurred which states that a juvenile adjudication is not considered to be a conviction under the law. *See* Individual's Exhibit J. The individual reiterated that he relied upon his belief that a juvenile adjudication is not a conviction that he would be required to disclose. At the hearing, the individual was asked why he did not ask how the October 1999 arrest affected the security clearance application process until he was interviewed during a PSI. The individual stated again that he believed the October 1999 arrest had been expunged from his record. Tr. at 130. He admitted that he recently looked at the expungement criteria specified in the QNSP and that it did not include juvenile matters. However, the individual stated that he was not aware of the criteria at the time he completed his QNSP.

After reviewing the evidence in the record and assessing the credibility of the individual's testimony at the hearing, I conclude that the individual has mitigated the security concerns arising from his omission of the October 1999 arrest on his 2004 QNSP. The individual persuaded me that he failed to reveal his October 1999 arrest on his QNSP because he believed that his juvenile adjudication was not a conviction and had been expunged from his record. I am also convinced that the individual now fully understands that he is to be totally forthright when completing security forms, and if he is unsure of how to answer a question, he must seek clarification from a security official. Accordingly, I find that the individual has sufficiently mitigated the security concerns raised by Criterion F.

C. Criterion L

As stated earlier, Criterion L relates to information indicating that an individual has engaged in unusual conduct or is subject to circumstances which tend to show that he is not honest, reliable, or trustworthy; or which furnishes reason to believe that he may be subject to pressure, coercion,

exploitation or duress which may cause him to act contrary to the best interests of national security. 10 C.F.R. § 710.8(l).

In the present case, the Notification Letter cites the following incidents which indicate that the individual has engaged in unusual conduct and which create security concerns with respect to Criterion L: (1) the individual was arrested for DUI on three occasions, October 1999, November 2004 and November 2005; (2) the individual admitted that he continued to drive on a suspended license in 2005; (3) the individual admitted that he operated a vehicle twice in 2005 while under the influence of alcohol; (4) the individual offered a police officer a \$1000 bribe during his 2005 DUI arrest and (5) the individual failed to report during a 2005 security briefing that he had been charged with DUI in 2004. We have stated on numerous occasions that conduct involving questionable judgment, unreliability, untrustworthiness, lack of candor, dishonesty, or failure to obey laws and follow rules and regulations raises a concern that the individual may not follow rules and regulations regarding the safeguarding of classified information.

D. Mitigation of Criterion L

1. Alcohol-Related Incidents

During the hearing, the individual attempted to explain each incident cited in the Notification Letter. With respect to the alcohol-related incidents, the individual acknowledges that he was arrested for DUI on three occasions, October 1999, November 2004 and November 2005. He also admits that he operated a vehicle twice in 2005 while under the influence of alcohol, resulting in his third DUI arrest on the second occasion. In addition, the individual admits that he offered a police officer a \$1000 bribe during his 2005 DUI arrest. During the hearing, the individual accepted full responsibility for these alcohol-related incidents, but asserted that he had taken serious steps to address the impact of alcohol in his life.

The individual testified that since November 20, 2005, the date of his third DUI, he has not consumed any alcohol (approximately 16 months as of the date of the hearing). Tr. at 115. After his last DUI, the individual stated that he enrolled in his employer's Employee Assistance Program Referral Option program (EAPRO) for a two-year period. *Id.* at 109. As part of EAPRO, the individual is required to abstain from alcohol use, submit to random substance/alcohol testing, complete outpatient drug and alcohol rehabilitation and meet with an Employee Assistance Program (EAP) counselor on a monthly basis. *See* Individual's Exhibit D. According to the individual, he met and continues to meet with the EAP counselor on a monthly basis. *Id.* He testified that the EAP counselor recommended that he attend an Intensive Outpatient Program (IOP) and get evaluated by a psychologist. *Id.* The individual further testified that he attended and successfully completed an eight-week IOP on April 18, 2006. He testified to the following:

[the IOP program] was . . . probably the first time really taking alcoholism seriously and learning what . . . it is and how it affects your life. . . . I've been to other classes and courses, as a result of DUI, but those are kind of just classroom settings, . . . But [the IOP program] was really the first time I sat down with a psychologist and a group

of other guys who were in there just like me, and . . . made an effort to learn what it was that I was doing to myself and how alcohol had been affecting my life. . . . So it helped me out a lot in regards to what I was doing to myself, and what would continue to happen if I continue to use alcohol.

Tr. at 110.

The individual asserted that while he was in the IOP, he began attending Alcohol Anonymous (AA) meetings two to three times a week and has obtained an AA sponsor. *Id.* at 112. ^{3/} He added that he started to go to church on a regular basis and that he learned strategies through the IOP to keep himself from having a drink. The individual also testified that his random urine screens conducted by his employer have all been negative. *Id.* at 117. The individual finally stated that he has changed his environment and no longer associates with people who drink. *Id.* at 141. He testified that his future intentions are to never use alcohol again. *Id.* at 128.

The individual also testified about the \$1000 bribe he offered a police officer during his 2005 DUI arrest. While he accepts responsibility for what was said, he testified that his judgment was impaired due to alcohol and he made a mistake. During the hearing, the individual offered the testimony of the police officer who arrested him for the 2005 DUI. The police officer testified that after he arrested the individual on a suspicion of driving under the influence, he put the individual in the back of his squad car and drove him to the police station. Tr. at 20. According to the police officer, while driving to the police station he observed the individual hitting his head on the side window of the patrol car and slipping his cuffs in front of him. He also observed that the individual tried to kick out the back window of the rear passenger door. *Id.* at 20, 26. He testified that the individual bribed him at least three times during the ride to the police station. At one point, the individual specifically offered the sum of \$1000 as a bribe. *Id.* When asked why he decided not to charge the individual with bribery, the police officer testified to the following:

As a patrolman for over two years, I've encountered many people that have been impaired beyond judgment. At no time, did I feel that [the individual] will come through with his bribery. I feel that he was impaired . . . impaired to his standards, and at no time did he withdraw any money from his pockets in an attempt to bribe me. The only thing that came out of him was words. . . .

Usually everyone I encounter that is impaired, offers us a bribe then, to let them go, give them a smaller citation, other than taking them to jail. . . .people are impaired beyond their judgment, and I feel at no time, that just words coming out of their mouth, that they're going to bribe me.

Id. at 22, 24

^{3/} During the hearing, the individual submitted AA verification slips as proof of his attendance at 117 AA meetings from February 2006 through January 2007. Individual's Exhibit G.

The police officer further conceded that a person must possess criminal intent to commit bribery and that he made a determination that the individual did not have that intent. *Id.*

2. Suspended License and Failure to Report 2004 DUI

During his 2006 PSI, the individual admitted that his driver's license was suspended in November 2004 due to a DUI arrest and that he continued to operate his vehicle until May 26, 2005, while it was suspended. He testified during the hearing that he drove his car from his home state to the state where he is currently employed and when he got there, he drove his car back and forth to work. Tr. at 125. The individual stated that he made an effort to drive safely, but offered no other explanation for driving on a suspended license other than his need to get to work.

With respect to the individual's failure to report the November 18, 2004 DUI, the individual asserted that this DUI occurred approximately four days after he completed his QNSP and that he was not aware of whether or not he actually held a DOE access authorization at that time. During the course of the hearing, the individual referred to DOE's Acknowledgment Form which states, *inter alia*, the following: "I understand that I am to notify the DOE directly within 5 working days of all arrests, charges . . . occurring during any period in which I may hold DOE access authorization and which occurred subsequent to the completion of the security forms" See DOE Exhibit 1. The DOE Personnel Security Specialist testified that the individual would not have known whether he had a clearance at the time of his 2004 arrest. 4/ Tr. at 32,34. Although the individual acknowledged that he thought his non-disclosure of the 2004 DUI could possibly have an effect on his security clearance, he asserted that he really never understood the requirements to report arrests and charges after the submission of his security forms. Tr. at 126. He further testified that he never intended to conceal information from DOE. *Id.*

After considering all the evidence in the record and assessing the credibility of the individual's testimony at the hearing, I conclude that the individual has not sufficiently mitigated the security concerns arising from the various charges listed under Criterion L. With respect to the alcohol-related incidents, I am convinced that the individual has acknowledged that he has an alcohol problem and has taken positive steps to address his abuse of alcohol, including his successful completion of an IOP, his participation in AA and his on-going counseling sessions with an EAP counselor. I am also convinced that the individual has not consumed alcohol for a period of about sixteen months as of the date of the hearing. In previous cases, Hearing Officers have generally found the security concerns associated with excessive alcohol use to be mitigated where the individual has established a new pattern of responsible use or abstinence that is sufficient to convincingly demonstrate that the chances of a return to the previous pattern of excessive use are remote. See, e.g., *Personnel Security Hearing*, Case No. TSO-0270, April 17, 2006 (three year pattern of responsible use sufficient to mitigate security concerns); *Personnel Security Hearing*, Case No. TSO-0300, May 23, 2006 (two year pattern of responsible use plus counseling and alcohol use education sufficient to mitigate

4/ The individual's access authorization was actually granted on November 24, 2004.

security concerns). In this case, however, although the individual has made great strides in addressing his alcohol problem and has established a sixteen-month pattern of responsible behavior, it is still too soon to determine that the individual's behavior is unlikely to recur. As stated above, the individual has been arrested for DUI on three separate occasions with his last DUI occurring in 2005, about 16 months prior to the hearing. A relatively short period of time has elapsed since this last DUI. I note also that the individual has not yet completed the EAPRO program.

With respect to the other two incidents cited under Criterion L involving the individual driving on a suspended license and his failure to report a 2004 DUI, I do not believe the individual offered sufficient mitigating circumstances to alleviate the security concerns associated with the individual's judgment and reliability. As mentioned earlier, the individual offered no explanation for driving on a suspended license other than his need to get to and from work. Although I believe the individual now realizes he made a mistake, his explanation exhibits poor judgment and a willingness to disregard laws. Similarly, I find the individual's explanation of his non-disclosure of a 2004 DUI is unpersuasive, particularly the assertion that it was unclear to him whether he had an access authorization at the time of the DUI. The individual admitted during his PSI and also stated during the hearing that he was aware that the DUI could affect his security clearance, but he still chose not to disclose the information. We have stated on numerous occasions that conduct involving questionable judgment, unreliability, untrustworthiness, lack of candor, dishonesty, or failure to obey laws and follow rules and regulations raises a concern that the individual may not safeguard classified information. *See Personnel Security Hearing* (Case No. VSO-0418), 28 DOE ¶ 82,795 (2001). Based on the foregoing, I cannot find that the individual has sufficiently mitigated the Criterion L concerns at this time.

V. Conclusion

Upon consideration of the record in this case, I find that there is evidence under Criteria F and L that raised a doubt regarding the individual's eligibility for an access authorization. While I find that the Criterion F security concerns have been sufficiently mitigated, I find insufficient evidence in the record to resolve the security concerns raised by the Criterion L derogatory information.

Therefore, I cannot conclude that restoring the individual's access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). Consequently, it is my decision that the individual's access authorization should not be restored. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth in 10 C.F.R. § 710.28.

Kimberly Jenkins-Chapman
Hearing Officer
Office of Hearings and Appeals

Date: October 3, 2007